No. 42427-4-II

COURT OF APPEALS, DIVISION-II

STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

VS.

OLUJIMI AWABH BLAKENEY,

APPELLANT.

Pierce County Superior Court

Cause No. 10-1-03138-5

The Honorable Brian Tollefson, Judge

STATEMENT OF ADDITIONAL GROUNDS

OLUJIMI A. BLAKENEY,
WASHINGTON STATE PEN.
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Walla Walla, WA 99362

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION-II

STATE OF WASHINGTON,
Respondent,

V.

OLUJIMI AWABH BLAKENEY
Appellant.

No. 42427-4-II

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, OLUJIMI AWABH BLAKENEY, have received and reviewed the opening brief prepared by my attorney. Summarized below are the addtional grounds for review that are not addressed in that brief. I understand the Court will review this statement of Additional Grounds for review when my appeal is considered on the merits.

Additional Grounds 1

See Attached See Attached

See Attached

Additional Grounds 2

see attached see attched see attached

If there are addtional grounds, a brief summary is attached to this statement.

Date: August 8th 2012 Signature Olujimi Blakeney

A. ASSIGNMENT OF ERRORS

1. Did Jury Instruction # 15 Lower the State's Burden Of Proof Requiring Reversal Of A Drive -By-Shooting?

2. Was Defendant/Appellant Denied His Constitutional Right To The Effective Assistance of Counsel When His Attorney Agreed To the Inadequate "Reckless" Instruction, Which Is A Misstatement Of The Law?

B. STATEMENT OF THE CASE

Appellant Adopts And Incorporates The Statement of the Case As Presented By Appellate Counsel In The Opening Brief Of Appellant. Additional Facts Will Be Presented Herein As They Relate To The Issues Presented.

C. ARGUMENT:

1. DEFENDANT/APPELLANT CLAIMS JURY INSTRUCTION NUMBER 15 LOWERED THE STATE'S BURDEN OF PROOF REQUIRING REVERSAL OF THE DRIVE-BY SHOOTING:

Jury instructions are sufficient when they allow Defense Counsel to argue their theory of the case, are not misleading, and when read as a whole, properly inform the trier of fact of the applicable law. State V. Douglas, 128 Wn.App. 555, 562, 116 P.3d 1012 (2005). We review challenged jury instructions de novo, examining the dffect of a particular phrase in an Instruction given. State V. Pirtle, 127 Wn2d 628, 656, 904 P.2d 245 (1995). In a Criminal case, the trial court must instruct the jury that the State has the burden to prove eash essential element of the crime beyond a reasonable doubt; and it is reversible error if the instructions relieve the State of that burden. Pirtle, 127 Wn.2d at 656. We presume that a "clear misstatment of the law" in a jury instruction is prejudicial. State V. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977).

Washington Pattern Jury Instruction: Criminal 10.03, at 209 (3rd ed. 2008). WPIC 10.03, the Recklessness Pattern Jury Instruction, provides [wrongful act] in brackets, followed by

directions to "fill in more particular description of act, if applicable." 11 WPIC 10.03 at 209. The pattern jury instruction thus directs a trial court to instruct the jury that, "in order to find the defendant "acted recklessly", it must find that the defendant "act[ed] recklessly when he or she kn[e][w] of the disregard[ed] a substantial risk that a [particular - result] m[ight] occur and this disregard [was] a gross deviation from conduct that a reasonable person would [have] exercise[d] in the same situation." WPIC 10.03 at 209.

To convict appellant Blakeney of a drive-by shooting, the jury had to find that Blakeney recklessly disregarded the substantial risk that "death or serious physical injury" to another person would occur as a result to his actions under RCW 9A.36.045 (1), not that a "wrongful act" would occur. Accordingly, the instruction stating that a jury could find Blakeney acted recklessly if he knew and disregarded the risk of an undefined "wrongful act" misstating the law regarding the crime of drive-by shooting.

State V. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005), did not squarely address the issue whether a trial court is required to describe the particular wrongful act necessary for a finding of recklessness as to a particular wrongful crime charged. But, Division One of this court recently held that a jury instruction relieved the State of its burden to prove each element of manslaughter charge where the jury instruction stated

that a person is reckless or acts recklessly, when he or she knows of and disregards "a substantial risk that a wrongful act may occur." State V. Peters, 163 Wn.App 836, 849-50, 261 P.3d 199 (2011). The court agreed with Division One's analysis and held that a jury instruction relieved the State of its burden to prove that Harris, 164 Wn.App 377 (2011), acted with disregard that a substantial risk of great bodily harm would result to the victim. Therefore, this court can also apply this same analysis to Appellant Blakeney's charge of drive-by shooting.

In instructing a jury, a trial court should use the statute's language, "where the law governing the case is expressed in the statute". State V. Hardwick, 74 Wn.2d 828, 830, 447 P.2d 80 (1968). Here, the law governing Blakeney's drive-by shooting charge is expressed in RCW 9A.36.045 (1), the statute "defining" drive-by shooting. The "recklessness" requirement must account for the specific risk contemplated under the statute. Here, substantial risk of "death or serious physical injury", and not some undefined wrongful act." Gamble, 154 Wn.2d at 468.

The risk contemplated per the drive-by shooting statute is of substantial risk of "death" or "serious physical injury" Thus, the definitional instruction told the jury it needed to find that Blakeney disregarded the risk of a "wrongful act", even read with the to convict instruction, relieved the State of its burden to show that Blakeney knew and disregarded that a substantial risk of death or serious physical injury could occur from his actions.

a. TO PROVE DRIVE-BY SHOOTING, THE STATE MUST SHOW THE DEFENDANT KNEW OF AND DISREGARDED A SUBSTANTIAL RISK THAT DEATH OR SERIOUS PHYSICAL INJURY MAY OCCUR, NOT A SUBSTANTIAL RISK THAT A WRONGFUL ACT MAY OCCUR.

The drive-by shooting Statute provides "A person is guilty of a drive-by shooting when [h]e recklessly discharges a firearm in a manner that create's a substantial risk of death or serious physical injury to another person and that discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge." **RCW 9A.36.045 (1).** In context of drive-by shooting, "reckless or recklessly" means that the defendant "knows of and disregards a substantial risk that death or serious physical injury may occur, and that his disregard of such substantial risk, is a gross deviation from conduct that a reasonable person would exercise in the same situation." **WPIC 10.03 and Comment.**

In other words, to prove a drive-by shooting, the State must show the defendant knew of and disregarded a substantial risk that a homicide may occur, see, Gamble, 154 Wn.2d at 467, or serious physical injury. In sum, to convict a defendant of a drive-by shooting the State must prove the defendant disregarded a substantial risk that death or serious physical injury would occur, not a substantial risk that some lesser

wrongful act would occur. "Jury instructions must inform the jury that the State bears the burden of proving each essential element of a criminal offense beyond all reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970); State V. Schulze, 116 Wn.2d 154, 167-68, 804 P.2d 566 (1991). "It is reversible error to instruct the jury in a manner that would relieve the State of the Burden of proof." State V. Pirtle, 127 Wn.2d 656, 904 P.2d 245 (1995).

b. REVERSAL IS REQUIRED

A jury istruction that lowers the State's burden of proof violates Due Process and therefore is an error of Cosnstituional Magnitude that may be raised for the first time on appeal. State V. Kyllo, 166 Wn.2d 856, 862, 215 P.2d 177 (2009). Constitutional errors require reversal unless the State proves beyond a reasonable doubt, that the error did not contribute to the verdict obtained. State V. Mills, 154 Wn.2d 1, 15, n.7, 109 P.3d 415 (2005)(citing NederV. United States, 527 U.S. 1, 119 S.Ct. 1827 (1967). The State cannot prove beyond all reasonble doubt that this error did not prejudice Appellant Blakeney.

It takes much less to create a substantial risk of any "wrongful act" that it does to create a"substantial risk of death or serious injury." A wrongful act could be any bodily injury, no matter how minor, as well as any damage to property, as well as any number of other non-homicidal acts. Mr.Blakeney's conviction should be reversed and the case remanded for a new trial. State V. Mills. 154 Wn.2d at 15.

2. DEFENDANT/APPELLANT CLAIMS THAT HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY AGREED TO THE INADEQUATE "RECKLESS" INSTRUCTION, WHICH MISSTATED THE LAW.

A. Mr. Blakeney had a Constitutional right to the effective assistance of counsel. U.S. Const. Amend. VI, Const. art. 1, § 22, United States V. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039 (1984), State V. Hendrickson, 129 Wn,2d 61, 77, 917 P.2d 563 (1996). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the

prosecution" to which they are entitled." Strickland V. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984)(quoting Adams V. United States ex rel McCann, 317 U.S. 269, 276, 63 S.Ct. 236 (1942)). An accused right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. "Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have". Cronic, 466 U.S. at 653-54.

A new trial should be granted if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. AS to the first inquiry (performance), an attorney renders Constitutionality inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. State V. McFarland, 127 Wn2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. Roe V. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029 (2000); See also, Wiggins V. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527 (2003)("[t]he proper

measures of attorney performance remains simply reasonableness under pervailing professional norms")(quoting Strickland, 466 U.S. at 688). While an attorney's decisions are treated with deference, his or her actions must be reasonable under all the circumstances. Wiggins, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. Strickland, 466 U.S. at 694; Hendrickson, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome". Strickland, 466 U.S. at 694, State V. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. Thomas, 109 Wn.2d at 226.

B. Defense counsel's performance was deficient because he failed to research the relevant case law and agreed to a jury instruction that misstated the law and was legally inadequate. "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." Kyllo, 166 Wn.2d at 862.

Here, as in Kyllo, supra, Mr. Blakeney's counsel's failure to research the relevant law, resulted in a jury instruction submitted to the jury for deliberation that lowered the State's burden of proof. As in Kyllo, this performance was deficient.

Indeed, counsel's performance here was even worse than that of the trial attorney in Kyllo, because in that case counsel was following the relevant WPIC. Kyllo, 166 Wn.2d at 865. The Supreme Court nevertheless held that a lawyer's performance was deficient because "there were several cases that should have indicated to counsel that the pattern instruction was flawed." Id. at 866. There is not legitimate strategic or tactical reason for allowing an instruction that incorrectly states the law and lowers the State's burden of proof. Id. at 867. (citing State V. Woods, 138 Wn.App 191, 201-02, 156 P.3d 309 (2007); State V. Rodriguez, 121 Wn.App.180, 87 P.3d 1201 (2004)). In Kyllo, the WPIC was consistent with the relevant case law. WPIC 10.03, and comment; Gamble, 154 Wn.2d at 467-68. Thus, if the attorney's performance was deficient in Kyllo, despite the fact that the instruction given was consistent with the WPIC, then counsel's performance here was certainly deficient There is no legitimate strategic or tactical basis for trial counsel's failure to research the relevant law and instead agreed to a instruction that is a misstatement of the law.

The Ninth Circuit has found ineffective assistance of counsel where trial counsel requested a jury instruction that was an incorrect statement of the law. Lankford V. Arave, 468 F.3d 585 (9th Cir. 200). In Lankford, supra, a pre-AEDPA Capital murder case, the Ninth Circuit reversed and remanded because trial counsel requested critical jury instructions that were

correct under federal law, but were incorrect statement of Idaho law. Lankford, 468 F.3d at 585.

C. DEFENSE COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED APPELLANT BLAKENEY, BECAUSE IT IS REASONABLY PROBABLE THAT IF PROPERLY INSTRUCTED THE JURY WOULD HAVE ACQUITTED MR BLAKENEY OR CONVICTED HIM OF THE LESSER OFFENSE.

As to prejudice, it is reasonably probable that the outcome would have been different but for the deficient performance Accordingly, Appellant's conviction should be reversed and his case case remanded for a new trial. As discussed above, it takes much less to create a substantial risk of any "wrongful act" than it does to create a substantial risk of death. Indeed the jury found Mr. Blakeney guilty of first degree murder, (indifference to human life), indicating that it rejected the defense theory that this is a first degree Manslaughter case, rather than a first degree murder case.

The evidence was sufficient for the court ot allow a lesser included instruction under the rules set forth in State V. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). Counsel had several cases where the "reckless" instruction was

set out for him to use correctly. See, State V. Harris, 164 Wn.App. 377 (2011), State V. Peters, 163 Wn.App. 836 (2011); State V. Keend, 140 Wn.App. 858, 166 P.3d 1268 (2007), State V. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005), and State V. R.H.S., 94 Wn.App. 844, 974 P.2d 1253 (1999). The aforementioned cases and the WPIC 10.03 at 209, explain how to draft the instruction using the word "reckless and recklessly". Therefore, counsel's performance was deficient.

A jury istruction defining "recklessness" as knowing of and disregarding a substantial risk that a "wrongful act" may occur is legally inadequte. As the Courts note, "recklessly causing a death and recklessly causing [a wrongful act] are not synonymous". Gamble,154 Wn.2d at 468, n.8. Following the Supreme Court decision in Gamble, the Washington Supreme Court Committee on Jury Instructions revised the definition of "recklessness". As amended WPIC 10.03 makes clear, the mens rea instruction defining recklessness for Manslaughter in the first degree must state that the [defendant disregarded a substantial risk of death]. Mr. Blakeney had a right to have his case submitted to a jury on the correct statement of the law.

When istructions are inconsistent, it is the duty of the court to determine whether "the jury was misled as to it's function and responsibilities under the law by that inconsistency. State V. Hays, 73 Wn.2d 568, 572, 439 P.2d 978

(1968). It follows from the cases previously cited, that where such inconsistency is the result of a clear misstatement of the law, the misstatement must be presumed to have misled the jury in a manner prejudicial to the defendant. Although it is unclear whether the jury would have reached a different conclusion had it been properly instructed, to the extent that the instruction misstated the law, it is presumed to be prejudicial. Cf. Wanrow, 88 Wn.2d at 239.

A legally erroneous instruction cannot be saved by the test for sufficiency. Wanrow, 88 Wn.2d at 237. Before addressing whether an instruction sufficed to allow a party to argue its theory of the case, the court must first decide if the instruction accurately stated the law without misleading the jury. State V. Acosta, 101 Wn.2d 612, 619-20, 683 P.2d 1069 (1984); Winrow, 88 Wn.2d at 237.

D. CONCLUSION

Review is appropriate in this case because Mr. Blakeney was denied his Constitutional right to the effective assistance of counsel. Defense Counsel was ineffective in submitting a jury instructiuon that misstated the law, and was legally deficient. This Appeal should be remanded for a new trial.

Respectfull Submitted this 8th day of August, 2012.

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

State of Washington)
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Olujimi Blakeney)
)

NO. 42427-4-II

AFFIDAVIT OF SERVICE
BY MAILING

I, Olujimi Blakeney, being first sworn upon oath, do hereby certify that I have served the following documents:

Supplement of Statement of Additional Grounds.

Upon:

The Court of Appeals Division II
950 Broadway Suitie, 300
Tacoma, Washington 98402

By placing same in the United States mail at:

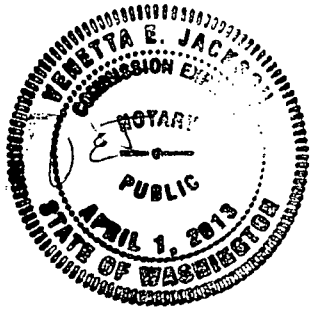
WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this 8th day of August, 2012.

Olujimi Blakeney # 854286
Name & Number

SUBSCRIBED AND SWORN to before me this 8th day of August, 2012.

Olujimi Blakeney #854286



Notary Public in and for the State of Washington. Residing at Walla Walla, WA. My Commission Expires: April 1, 2013